United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

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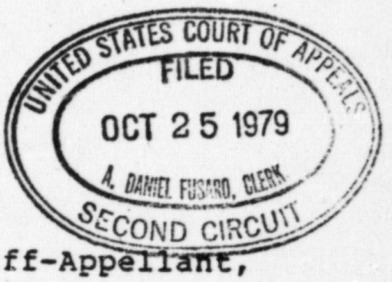
For the Second Circuit

No. 75-7600



COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff-Appellant,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, AND UPON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR AARON COPLAND, et al., AS AMICI CURIAE

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October 25, 1979

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Aaron Copland, et al., submit this brief as amici curiae in support of the defendants-appellees, American Society of Composers, Authors and Publishers ("ASCAP"), et al., seeking affirmance of the order entered by the District Court for the Southern District of New York on September 25, 1975. Eubie Blake, Sammy Cahn, Betty Comden,

Hal David, Ira Gershwin, Adolph Green, Gian Carlo Menotti,* Vincent Persichetti, Ned Rorem, William E. (Billy) Taylor, Virgil Thomson, and the Estates of Bela Bartok, Edward Kennedy (Duke) Ellington and Igor Stravinsky join in this brief as amici curiae.

Interest of Amici Curiae

The amici curiae, Aaron Copland, et al., are composers of music, authors of lyrics for music, and members of ASCAP. These amici curiae have interests in this litigation of several kinds.

As creators of music, they have a vital interest in the manner in which performance rights are licensed to, and royalties collected from, television networks and from all other users. Any decision by this Court to the effect that ASCAP's method of licensing performance rights for the amici curiae's works is an unlawful restraint of trade under Section 1 of the Sherman Act, may be read to mean that amici and other members of ASCAP were parties to an illegal combi-

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* Mr. Menotti resigned as an ASCAP member effective January 1, 1979 and is now affiliated with another licensing organization, SESAC, Inc. However, his works written prior to that date remain in the ASCAP repertory and he continues to receive payments from ASCAP for performances of his pre-1979 works.

nation. Amici may be exposed to treble damage liability and may have to incur literally ruinous legal expenses in defending themselves. Amici have, therefore, a great personal interest, quite apart from their interest in ASCAP's survival and effectiveness, in an affirmance by this Court of the order of the District Court.

A finding by this Court that the ASCAP blanket license violates the rule of reason might not only outlaw blanket licensing for television networks, but any blanket licensing that an organization like ASCAP could engage in. If that were to happen, and if ASCAP were effectively destroyed, these amici and other current members of ASCAP and BMI would be left without effective means of seeing that royalties were paid for the performance of their works by the tens of thousands of users of music in the United States. Composers, authors, and publishers would be thrown back to the unhappy condition in which they existed prior to the organization of ASCAP: the copyright laws of the United States gave composers, authors, and publishers of music the legal right to receive royalties for the performance of their works but that legal right was largely worthless because of the utter impossibility of private individuals learning of all performances and either negotiating satisfactory licenses or suing for infringement.

Moreover, even if the ASCAP blanket license is held to be an unreasonable restraint of trade only as to television networks, and if the amici are found to have misused their copyrights, the amici will certainly suffer heavy losses of royalty income because of the expenses of litigation incurred by ASCAP as a result of lawsuits with myriads of licensees all over the United States who will seek to take advantage of such a decision, possible treble damage awards against ASCAP and themselves, and the possibility that royalties may not be collectible, either by ASCAP or amici, on copyrights held to have been misused.

Summary of Argument

ASCAP's blanket license to CBS is completely lawful under Section 1 of the Sherman Act. That conclusion is clear not only from a rule of reason analysis in general but, more specifically, from the reasoning of the Supreme Court's opinion in this case.

Upon ASCAP's and BMI's petitions for certiorari, the Supreme Court had before it only the question of the per se illegality of the blanket license. The rule of reason issue was not formally presented, and, after ruling that per se illegality was inappropriate, the Court necessarily remanded for decision of the rule of reason issue, if that had been preserved. The Supreme Court's examination of the

blanket license, however, actually consisted of an extensive rule of reason analysis, and the Court's conclusion demonstrates that the blanket license is completely lawful under that analysis. Any other conclusion is foreclosed by the Court's opinion. In the argument that follows, therefore, while amici will present additional considerations to support their position, amici rely heavily upon the Supreme Court's reasoning in this case.

Several independent reasons compel the conclusion that ASCAP's blanket license to CBS complies with the requirements of Section 1 of the Sherman Act.

1. ASCAP, as the Supreme Court recognized, is not a joint sales agency for the individual performing rights of its members but is instead the seller of a separate product, the blanket license. Its function is that of a manufacturer which buys raw materials (the nonexclusive performing rights belonging to others) and combines them into a new, finished product (the blanket license). A manufacturer's contracts with its suppliers are not price-fixing contracts and ASCAP has no contracts or agreements regarding the price of blanket licenses with any other marketer of blanket licenses. Section 1 of the Sherman Act, therefore, does not apply to ASCAP's blanket license because there are not two parties to any contract, combination or conspiracy in restraint of trade.

2. If ASCAP were analyzed as a joint sales agency, it is clear that the blanket license is not an undue restraint of trade for two reasons:

(a) The Supreme Court has repeatedly recognized, and has done so again in this very case, that a restraint of trade necessarily involves a restriction of output. The Supreme Court has also stated in this case that ASCAP's blanket license is unlikely to decrease output.

(b) If there were any conceivable tendency to a restriction of output here, the enormous efficiencies created by ASCAP's blanket license, cited by the Supreme Court, clearly would outweigh any such tendency. This fact makes the restraint, assuming there to be any, a reasonable one and hence lawful under Section 1 of the Sherman Act.

3. CBS seeks discriminatory treatment which the ASCAP consent decree forbids and, more important, which is forbidden by Section 1 of the Sherman Act. As the Supreme Court has made clear, the blanket license is inevitable because of the otherwise prohibitive transaction costs of licensing. ASCAP may not lawfully discriminate against other licensees by giving one licensee or one group of licensees a different form of license, nor does the law permit such discrimination by court order.

4. If, for some reason, it were deemed socially desirable to single out CBS or television networks generally for special treatment, that decision may not be made in the guise of an antitrust decision, nor, consistently with Article III of the Constitution, may it be made by the federal judiciary. The decision would not be one about competition, which is the sole subject governed by Section 1 of the Sherman Act. The decision would be a purely political choice about the fair distribution of resources, rewards and incentives in the music industry and is, therefore, a political question in the core meaning of that term. The existing distribution of resources, rewards and incentives follows from the decision of the political branches, embodied in the Copyright Act, since, as the Supreme Court has stated, this is a market arrangement "reasonably necessary to effectuate the rights that are granted" by that law. If a different political choice is to be made at CBS' instigation, that choice lies with Congress and the President, not with the judiciary.

ARGUMENT

The task of this Court is to apply the rule of reason tests developed under Section 1 of the Sherman Act to a business practice which is unique. As the Supreme Court put it (99 S. Ct. at 1557):

> "We have never examined a practice like this one before; indeed, the Court of Appeals recognized that '[i]n dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are sui generis.'"

It is to be remembered, however, that blanket licensing, though unique, is not new or unfamiliar. It is the universal means of licensing musical performance rights of the sort involved here throughout the world. It has, moreover, been addressed repeatedly by all three branches of the federal government and has been approved by all three. These considerations alone suggest the improbability of the notion that ASCAP's blanket license to CBS can somehow now be tortured into a violation of law.

That the blanket license at issue here is lawful under Section 1 of the Sherman Act is specifically demonstrated by each of four independent arguments.

I.

SECTION 1 OF THE SHERMAN ACT DOES NOT APPLY BECAUSE THERE IS NO SHERMAN ACT "CONTRACT, COMBINATION . . ., OR CONSPIRACY"

Section 1 of the Sherman Act, of course, applies to "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ." Unless an agreement restraining trade between two or more

persons can be found, the statute has, by definition, no application.

Here, ASCAP has no agreement on the price of the product it sells with any other firm. This case has often proceeded, however, as if the blanket license combined and thereby fixed the prices of individual use licenses. That is not, however, an accurate or economically realistic analysis. The analysis that accurately describes the economic functions involved is that ASCAP, like a manufacturer or assembler, gathers raw materials or inputs (the individual use licenses) from a number of suppliers (the writers and publishers) and reassembles the inputs into a new product (the blanket license). It is obvious under this analysis that the Sherman Act has no application. General Motors buys tires, steel sheet, glass, and other products from thousands of suppliers and combines them into automobiles. When the automobile is sold, the customer pays a price for it and no one suggests that price-fixing or suppression of competition is in any way involved because the customer does not have the opportunity to negotiate individually with General Motors' suppliers to determine their input price. (Here, CBS actually has the right, guaranteed by the consent decree, to deal directly with ASCAP's members). So analyzed, neither General Motors (in the process of putting together and selling auto-

mobiles), nor ASCAP (in the process of putting together and selling blanket licenses) has engaged in any contract, combination, or conspiracy within the meaning of the Sherman Act.

This is not only a realistic analysis of ASCAP's function, it is the analysis endorsed by the Supreme Court in this case. Mr. Justice White's opinion for the eight-member majority discussed the great efficiencies ASCAP provides even for television network licenses: reduction of costs by creating a blanket license that is sold only a few, instead of thousands, of times; obviation of the need for close monitoring of the networks; and provision of necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of individual copyright owners (99 S. Ct. at 1563). The majority opinion drew from this the conclusion that the blanket license is a unique product, something altogether different from the individual use licenses which are only a part of its composition (99 S. Ct. at 1563):

> "This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product."

The opinion then recounted some of the characteristics of a blanket license which make it sui generis (99 S. Ct. at 1563-64):

> "The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of private or individual negotiations and great flexibility in the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of this marketable package, and even small performing rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses."

At this point, in a footnote (99 S. Ct. at 1564 n.39), the majority opinion quoted a legal article to the effect that "'no performing rights are licensed on other than a blanket basis in any nation in the world.'" The universality of blanket licensing of performing rights suggests, of course, not merely its efficiences but the fact that individual use licenses are not even close substitutes for it. When products are not substitutes, they are not the same products. This bears out the Supreme Court majority's analysis. The Court then went on to adopt the view of ASCAP as a manufacturer or assembler rather than a mere conduit for other persons' products (99 S. Ct. at 1564):

> "Thus, to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate

> seller offering its blanket license, of which the individual compositions are raw material. ASCAP, in short, made a market in which individual composers are inherently unable to fully effectively compete."

It follows ineluctably from this reasoning of the Supreme Court that ASCAP's blanket license, the final product made from the raw material of the individual compositions, is not a contract, combination, or conspiracy any more than a ton of steel is a contract, combination, or conspiracy among the suppliers of coal, iron ore, lime, and other raw materials that went into the product. There is not even an allegation of an agreement about license fees between ASCAP and BMI, and, of course, no such agreement exists. Thus, there are no parties to any trade-restraining contract, combination, or conspiracy and the Sherman Act does not apply.

II.

ASCAP'S BLANKET LICENSE DOES NOT VIOLATE THE SHERMAN ACT BECAUSE IT IS NOT AN UNREASONABLE RESTRAINT OF TRADE

If we assume, arguendo, that ASCAP should be looked at as a joint selling agency rather than the producer of a product, then there may be a "contract" or "combination" sufficient to warrant rule of reason analysis, but Section 1 of the Sherman Act is not violated because there is no unreasonable restraint of trade.

(a) There Is No Restraint Of Trade At All.

A restraint of trade is a restriction upon competition, and it becomes an unreasonable restraint of trade only when it leads not to increased efficiency but to a restriction upon output. This has been the core, if not the exclusive, meaning given the term "restraint of trade" in price cases since the inception of the rule of reason. In Standard Oil Co. v. United States, 221 U.S. 1, 52 (1911), the case which introduced the rule of reason into the Sherman Act, Chief Justice White identified the evils of monopoly, which he later interpreted as the evils at which the Sherman Act was aimed, as: "(1) The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; (2) The power which it engendered of enabling a limitation on the production; and (3) The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale." These, of course, are all varieties of restriction of output. The second -- limitation of production -- is so in terms. The first -- the power to fix prices -- can, of course, only be exercised by controlling output. The third -- the deterioration in quality -- is a limitation of output accomplished by putting less in the product rather than openly raising price.

The Supreme Court in the case now at bar followed that interpretation of the Sherman Act, stating that the test for application of a per se rule is "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more rather than less competitive'" (99 S. Ct. at 1562). Rule of reason inquiry, while not facial, is necessarily intended to answer the same questions: Is there a decrease in output so that a restraint is present, and, if there seems to be, is there a gain in efficiency that more than compensates so that the restraint is reasonable? The Supreme Court has answered elsewhere in its opinion that there is probably no decrease in output because of the blanket license (99 S. Ct. at 1564 n.40):

> "[B]ecause of the nature of the product -- a composition can be simultaneously 'consumed' by many users -- composers have numerous markets and numerous incentives to produce, so the blanket license is unlikely to cause decreased output, one of the normal undesirable effects of a cartel. And since popular songs get an increased share of ASCAP's revenue distributions, composers compete even within the blanket license in terms of productivity and consumer satisfaction."

The Supreme Court has thus said that it is unlikely that there is a restraint of trade here at all. This seems

to us to end the case and require its remand with instructions to dismiss because it is impossible to imagine that CBS could offer any probative evidence showing, contrary to the Supreme Court's reasoning, that the blanket license does, as a matter of fact, decrease the productivity of authors and composers.

The Supreme Court's conclusion is obviously correct. A cartel formed to get higher prices by restricting output must assign each member a share of the increased profit. Otherwise, there would be no point in uncompensated members joining or staying in the cartel. The essential dissimilarity of ASCAP to a cartel is shown by the fact that each ASCAP member is compensated through a complex formula that reflects the popularity of, and demand for, his product. Most members never receive an ASCAP check. (They remain members because they know that users may select their works for performance if they are part of the valuable ASCAP repertory, whereas users would never seek them out for direct licenses, if they were not members. They also know that ASCAP will reward them fairly for surveys of performance, in accordance with distribution rules that are part of a federal court consent decree). If this were a cartel engaged in output restriction, those members would leave to bargain individually or to form their own association. They do not form a new organization to

license their performing rights because it is perfectly apparent to everyone concerned that ASCAP is not restricting output. The economic indicia of a cartel are entirely absent.

For these reasons, we think it plain that ASCAP's blanket license does not restrict output and is not a restraint of trade, and the Supreme Court has already said as much.

(b) Assuming There Is A Restraint Of Trade, It Is Lawful Because Reasonable.

We will carry the argument a step further and suppose that it might be argued that the Supreme Court did not say absolutely there was no restriction of output. Though it is unclear what follows from that statement, it might lead a court to engage in a balancing test. Where a significant possibility of a restriction of output exists (as it does not here), a court may wish to weigh the respective possibilities of output restriction and efficiency creation. That is what the Supreme Court indicated when it said, in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), that the problem to be addressed was the capacity of vertical market division to stimulate interbrand competition (through increased efficiency in distribution) and to suppress intrabrand competition (by limiting or preventing dealers in the same brand from seeking the same customers). Where the probability of efficiency outweighs the probability of output restriction, the restraint is a reasonable one.

In the present case, ASCAP's blanket license creates massive efficiencies that obviously outweigh any possible restriction, and the Supreme Court's opinion cannot be read in any other way than as so finding. So obvious is the utility of blanket licensing that it has been approved by every branch of the United States government. Thus, the Court stated (99 S. Ct. at 1559):

> "[I]t cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices. In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain." (Footnotes omitted).

The Court also noted (99 S. Ct. at 1560) that Congress in the new Copyright Act provided for blanket licenses for secondary transmissions by cable television systems, for the use of copyrighted compositions in jukeboxes, and for payments by noncommercial broadcasters for their use of copyrighted music. Congress, as well as the Court, obviously perceives valuable efficiencies in the blanket license.

In fact, the fair inference to be drawn from the Copyright Act is enough by itself to require a decision

that blanket licensing is lawful under the Sherman Act. The Supreme Court observed (99 S. Ct. at 1562):

> "Although the copyright law confers no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a per se violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all or would exist only as a pale reminder of what Congress envisioned."

The logic of this passage extends to the present stage of the proceedings as well. It is not to be expected that a market arrangement reasonably necessary to effectuate rights granted by the Copyright Act, as the Supreme Court found blanket licensing to be, should be illegal at all, whether on a per se or a rule of reason analysis. These conclusions of the other branches of government, embodied in the consent decree and the Copyright Act, are themselves such powerful testimony to the utility and reasonableness of blanket licensing that, if there were nothing else, it would be virtually inconceivable that ASCAP's blanket licenses could be held illegal. But there is more, and it is to be found in the opinion of the Supreme Court in this case.

We have already quoted the Court's statement that the blanket license is unlikely to cause a restric-

tion of output (p. 14, supra). That is one side of the equation. The other side is the Court's acceptance of the fact that ASCAP and its blanket license create enormous efficiencies.

We have also quoted (pp. 10-11, supra) the Court's discussion of the blanket license's superiority in efficiency over the individual use license (99 S. Ct. at 1563-64). But the Court also stated that "ASCAP and the blanket license developed together out of the practical situation in the market place: thousands of users, thousands of copyright owners, and millions of compositions" (99 S. Ct. at 1562-63). Transaction costs would be prohibitive without both an organization like ASCAP and the blanket license (99 S. Ct. at 1563):

> "A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner."

The blanket license avoided the thousands, or millions, of individual negotiations, the intricate schedule of fees and uses for individual compositions, the reporting problem for the user, and the policing task for the copyright owner. It is important to stress here that to a

real degree ASCAP and the blanket license are inseparable: the efficiencies which ASCAP creates are in large measure due to its use of the blanket license. The Supreme Court recognized that, and indeed it is obvious from the nature of the efficiencies discussed that they could not be attained to anything like the same extent with per use licenses or by individual negotiations by users of music with writers and composers.

CBS has tried to avoid the dispositive force of these facts by claiming that the blanket license is all right for other licensees but not for itself and the other television networks. The Supreme Court recognized and answered this argument as well. It noted that the advent of radio and television networks changed market conditions. But the crucial point, when we must balance possible restriction of output against efficiencies, is that the Court stated that blanket licenses still created great efficiencies. It said, in a passage we think dispositive of the charge of unreasonable restraint (99 S. Ct. at 1563):

> "With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case where the potential users are individual television or radio stations, or the thousands of other individ-

> uals and organizations performing copyrighted compositions in public. But even for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for."

In a footnote to the observation that the blanket license is sold only a few, instead of thousands, of times, the Court noted that "The District Court found that CBS would require between 4,000 and 8,000 license transactions per year" (99 S. Ct. at 1563 n.35). Presumably, NBC and ABC would require comparable numbers of license transactions if the blanket license were not used. It is apparent, therefore, that the transaction costs of dealing with the television networks would be large if per use licensing were substituted for blanket licensing. The Court continued its catalogue of efficiencies of blanket licensing for the television networks (99 S. Ct. at 1563):

> "ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established." (Emphasis added).

The Supreme Court has thus already found that ASCAP's blanket license is necessary to achieve large

efficiencies in dealing with the television networks, that an established price for that license is essential, and that there is little likelihood of any restriction of output. These findings conclusively defeat CBS' complaint.

III.

BOTH THE SHERMAN ACT AND THE CONSENT DECREE FORBID THE DISCRIMINATION CBS SEEKS IN THIS CASE

CBS' position with respect to the relief that the Sherman Act supposedly requires resembles a kaleidoscope. It changes from court to court and pleading to pleading, apparently guided less by any analysis or understanding of market realities than by CBS' shifting perceptions of tactical expediency.

In its latest version of the Sherman Act's commands, CBS argues that the law demands that ASCAP not even be allowed to offer a blanket license to a network, though ASCAP may offer blanket licenses to others. This must be the first time that a purchaser with the legal and actual ability to purchase from others has said that antitrust principles require that one seller withdraw its products from the market altogether and stop offering that purchaser a choice. This Court ought to view with considerable suspicion a legal theory that requires such remedial contortions.

But CBS goes on to suggest that ASCAP might additionally be required to offer per-use licenses with the fees set by the writers and publishers, and that the district court "scrutinize the operation of this system with extreme care" to prevent collusion.

CBS seeks to have this Court award to the television networks a preferential access to copyrighted works, one that will enlarge the transaction costs but will shift those costs to ASCAP, writers and publishers, and to taxpayers, who provide the budget for the district court. That is not an increase in competition or economic efficiency; it would create a loss of economic efficiency, but with a net benefit to CBS from the redistribution of the burden.

That there would be a net increase in costs is clear. As the Supreme Court stated, it would be very expensive if the blanket license were forbidden. Either ASCAP or individual writers and publishers would have to engage in 4,000 to 8,000 license transactions per year with CBS instead of only one. Since CBS wants ASCAP forbidden to offer blanket licenses to NBC and ABC as well, it appears that somewhere between 12,000 and 24,000 additional transactions would be required.

CBS has no intention of paying these heavy additional costs. They will be borne in part by ASCAP and in

part by the district court. The part borne by ASCAP will ultimately be paid by ASCAP's members and by other ASCAP licensees. What CBS is seeking, in short, is judicially-enforced discrimination in its favor.* The system it demands cannot be given to all licensees; it could only be given to a specified subset (at an increased cost); and there is no legal criterion by which CBS and its sister networks can be chosen as the favored subset.

Principles developed in Sherman Act cases forbid ASCAP to give CBS preferential treatment, such as a per-use license, which is not and cannot be given to all licensees.

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* CBS has made great play with the notion that ASCAP's blanket license results in economic discrimination because the fee is either based on network revenues or is influenced by audience size. There is nothing to that contention. Aside from the fact that economic discrimination is not a violation of Section 1 of the Sherman Act and that CBS failed to prove such discrimination at trial, it is clear that the facts cited tend to show nondiscrimination. What ASCAP sells is access to its repertory. Its fees are affected by, among other factors, the number of persons who will hear the music. That is precisely the same principle as that which CBS follows in selling time to advertisers. Network rates go up in prime time or for special events because the audience is larger. It cannot be either illegal or unethical for ASCAP to follow the same practice. Moreover, a fee that varies with use in this fashion is not economic discrimination. If ASCAP were to charge a single, flat fee, no matter how many persons to whom the music was "resold" -- e.g., one fee for both CBS and a dance hall -- that would be economic discrimination.

While the blanket license is a business practice unique in the experience of the Supreme Court, organizations similar to ASCAP are not. The conditions of a particular industry sometimes require a large organization in order for the market to function effectively. That is the situation with ASCAP, as the Supreme Court has found: "It takes an organization of rather large size to monitor most or all uses and to deal with users on behalf of the composers. Moreover, it is inefficient to have too many such organizations duplicating each other's monitoring of use" (99 S. Ct. at 1562 n.32). It is also true that the multiplication of such organizations would raise transaction costs sharply if users tried to take licenses from less than all and had to check continually to learn whether they were licensed for particular compositions.

While the organizations are by no means identical, certain of the legal principles applied in cases like United States v. Terminal Railroad Ass'n of St. Louis, 224 U.S. 383 (1912), and Associated Press v. United States, 326 U.S. 1 (1945), are applicable here. The St. Louis Terminal Association was a combination of terminal facilities for railroads in and around St. Louis. Due to the terrain the Association had a natural monopoly. The Court did not want to dissolve the combination because of the superior

efficiencies it created. The Court's solution was to end the possibility of discrimination by the railroads that owned the association by a decree that allowed all to own or use the facilities without discrimination.

Associated Press presented a similar problem. Its news interchange was enormously efficient but it discriminated against applicants for membership who were in competition with existing members. Each member was not only a supplier of news but a customer for AP's service. The Court held the restraints on membership by competitors unlawful, and, once more, its solution was to require nondiscrimination. Newspapers, as both suppliers and subscribers, were to be equal in the terms upon which they dealt with the Associated Press.

The Terminal Association was a monopoly. Neither Associated Press nor ASCAP is, though, undeniably, the nature of nationwide newsgathering by combining independent papers and the nature of the performing rights market require large organizations.

The significance of this is that ASCAP now stands where the Terminal Association and the Associated Press stood after the Sherman Act had been applied to them and the defects in their behavior remedied. ASCAP has been through intensive antitrust scrutiny for decades and it is

now subject to a complex consent decree which guarantees nondiscrimination. But even if the consent decree did not exist, an organization like ASCAP would have a duty of treating members and licensees equally.

CBS' complaint here is an effort to obtain unequal treatment as an antitrust remedy. The very idea is a contradiction in terms. It is admitted that ASCAP cannot operate a per-use licensing program for all of its licensees or, indeed, even for any significant fraction of them.

Any situation in which CBS gets a licensing program which cannot be given to others (or, at most, could also be given to NBC and ABC) is discriminatory. The necessity of ASCAP and the blanket license, as the Supreme Court said, arises because of the enormous number of transactions and the enormous amount of policing that would otherwise be required. CBS contributes to both of these problems as much as other licensees and more than most. There is no reason to set CBS aside for favored treatment any more than there is to set aside any other licensee. ASCAP can conceivably give any one licensee, or any small class of licensees, the favored treatment that CBS wants. It cannot give that treatment to all or to the vast majority, and there is no reason why a class of a favored few should be created or why CBS should be in that class if it were created.

The problem of discrimination, which CBS seeks, is compounded by the fact that all other licensees are not before the court. If a status of favored few were to be judicially created, then ASCAP ought to be treated as a stakeholder and all of the tens of thousands of ASCAP licensees brought into court to litigate their entitlements to favored-few treatment. It is fundamentally unfair to distribute ASCAP's resources to CBS when thousands of others with equal or perhaps better claims are not heard.

But the basic point is that there can be no small class of specially favored licensees because cases like St. Louis Terminal and Associated Press establish a Sherman Act rule of nondiscrimination. ASCAP abides by that rule and, for good measure, is required by its consent decree to do so. CBS' claim is unsound at bottom because it seeks to require ASCAP to adopt a policy of discrimination in its favor. That cannot and should not be done.

IV.

CBS' COMPLAINT SHOULD BE DISMISSED BECAUSE THERE ARE NO CRITERIA UNDER THE SHERMAN ACT OR ANY CRITERIA FIT FOR JUDICIAL USE BY WHICH CBS CAN BE AWARDED FAVORED TREATMENT

Section 1 of the Sherman Act forbids unreasonable restraints of trade in the interest of promoting competition. It provides no criteria whatever for making an essentially

political choice between CBS and ASCAP as well as between CBS and all other licensees. Indeed, analysis of what CBS seeks here shows that it would plunge the federal judiciary into a political question forbidden that branch of government by Article III of the Constitution of the United States.

Thus, even if all other licensees were before this Court, and even if, which we deny, there was some social policy suggesting that television networks be preferred to writers and publishers and to other licensees of performing rights, that would not be a decision that could be made in antitrust litigation nor one appropriate for judges who have no guidance from specific legislation. The choice is legislative, not judicial, in nature.

The choice in which CBS seeks to involve this Court is political because it is a choice between interest groups that can be made only on general principles of political philosophy. To hold for CBS the Court would have to decide to prefer it to all other licensees of performing rights. We have seen that the blanket license must be used with the vast majority of licensees and that its abandonment with respect to CBS and other television networks would impose very heavy additional costs. There is no principled criterion by which any court can decide that CBS should be so favored but that local television stations, or radio

networks, or ballrooms, or cocktail lounges, should not. Antitrust rules provide no criterion; no law does.

CBS' complaint also seeks a choice in its favor and against the writers and publishers represented by ASCAP. The additional costs imposed and the loss of revenues incurred by the abandonment of blanket licensing would be a redistribution of resources away from creative artists and to television networks, away from the creation of music and lyrics and toward one mode of their transmission. This is an issue of wealth or income redistribution, and here, oddly enough, the Court is asked to make the transfer from the less wealthy to the more wealthy. We have already pointed out that in the Copyright Act, Congress has decided this question, choosing to give creative artists greater rewards and incentives, and the Supreme Court has stated that ASCAP's blanket license is reasonably necessary to effectuate that choice. But now we are making a different, though equally conclusive, point: even if there were no Copyright Act, courts could not do what CBS wants.

That is true because there are no antitrust answers to the questions posed. The question of how much Producer A should receive at the expense of Producer B is like the question of how much A should be taxed for B's

benefit. Antitrust law long ago eschewed such political questions when it decided not to judge the legality of price-fixing agreements by the "reasonableness" of the price fixed. The rejected "reasonable price" standard was a proposal that the courts judge how much, on general principles of political or social philosophy, sellers should get from buyers. The law's answer was that such decisions were not for courts. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 331-332 (1897); United States v. Trenton Potteries Co., 273 U.S. 392, 396-398 (1927).

This aspect of antitrust is really a part of, and rests upon, a broader view of the role of Article III courts in government. The Supreme Court made that clear in cases such as United States v. Cohen Grocery Co., 255 U.S. 81 (1921), and Cline v. Frink Dairy Co., 274 U.S. 445 (1927). These cases rely primarily upon the void-for-vagueness doctrine elaborated under the due process clauses, but the Supreme Court made clear that that doctrine rests in large measure upon considerations of the proper role of the judiciary. As the late Alexander M. Bickel put it,

> "when the Court finds a statute unduly vague, it withholds adjudication of the substantive issues in order to set in motion the process of legislative decision. It does not hold that the legislature may not do whatever it is that is

> complained of but, rather, asks that the legislature do it, if it is to be done at all."

A. Bickel, The Least Dangerous Branch 152 (1962) (emphasis in the original).

The same constitutional policy underlies the political question doctrine of Article III. As the Supreme Court said in Baker v. Carr, 369 U.S. 186, 217 (1962):

> "Prominent on the surface of any case held to involve a political question is found . . . a lack of judicially discoverable and manageable standards for resolving it; or the impossiblity of deciding without an initial policy determination of a kind clearly for nonjudicial discretion . . . ."

It is for this reason that Justice Jackson said for the Court in Wickard v. Filburn, 317 U.S. 111, 129 (1942):

> "The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination."

Here, in a field already heavily regulated by statute and by consent decree, CBS is arguing that the balance of advantages so arrived at ought to be judicially rearranged so as to shift rewards to it at the expense of authors, composers, publishers, and other licensees. This is not an argument about competition; it is an argument about which groups, which economic interests, should be given a larger slice of the pie. It is an argument properly addressed to Congress, not the federal courts.

CONCLUSION

For the reasons stated, the order below should be affirmed.

Respectfully submitted,

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October 25, 1979

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October 24, 1979

Columbia Broadcasting System, Inc. v. ASCAP
Dkt. No. 75-7600 (2d Cir.)

Dear Mr. Bork:

This is to confirm that CBS consents to your filing a brief amicus curiae on behalf of Aaron Copland, et al. in the above-referenced matter in the United States Court of Appeals for the Second Circuit, on or before October 25, 1979.

Sincerely yours,

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October 24, 1979

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CBS v. ASCAP

Dear Mr. Bork:

This is to confirm that ASCAP has consented to your filing a brief amicus curiae on behalf of Aaron Copland, et al. in the above matter in the United States Court of Appeals for the Second Circuit.

Sincerely,

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Re: CBS v. ASCAP

Dear Mr. Bork:

This is to confirm that BMI has consented to your filing a brief amicus curiae on behalf of Aaron Copland, et al. in the above-referenced matter in the United States Court of Appeals for the Second Circuit.

Sincerely yours,

Norman C. Kleinberg

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